[2017] UKFTT 544 (TC)

TC05993

Appeal number: TC/2016/01937

INCOME TAX – penalty for non-payment of accelerated partner payment- application for disclosure – whether Tribunal has jurisdiction to consider HMRC's calculation of accelerated partner payment in penalty appeal – no – question of jurisdiction determined as a preliminary issue and application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID BEADLE **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JONATHAN RICHARDS

Sitting in public at the Royal Courts of Justice, Strand, London on 12 and 13 June 2017

David Ewart QC, instructed by Jefferies Essex LLP for the Appellant

Aparna Nathan, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. Mr Beadle is appealing against a penalty that HMRC have assessed relating to the late payment of sums due pursuant to a partner payment notice ("PPN") issued under provisions of the Finance Act 2014 ("FA 2014"). In the context of that appeal, he has made an application under Rule 5(3)(d) of the Tribunal Procedure (First-tier Tribunal) Rules 2009 (the "Tribunal Rules") for HMRC to disclose information to him. He believes that information will help him to establish that the "understated partner tax" that HMRC have calculated for the purposes of the PPN does not represent an amount of tax that could lawfully have been due for the relevant tax year. If he can establish that, he wishes to argue in the substantive appeal that the accelerated partner payment demanded (which is equal to the "understated partner tax" that HMRC calculated) either was, or should have been, nil with the result that no penalty can arise for failing to pay it. HMRC are opposing that application on the grounds that the information that Mr Beadle seeks is not relevant to his appeal, broadly because the Tribunal does not have jurisdiction to look behind HMRC's calculation of the understated partner tax or accelerated partner payment and/or that it would be an abuse of process for Mr Beadle to raise that argument in his penalty appeal (as they consider he should have raised it in judicial review proceedings).

2. Mr Beadle's application, and HMRC's response to it, give rise to a question of procedure. If I dealt only with the interlocutory application for disclosure, decided that the Tribunal does have jurisdiction to hear Mr Beadle's ground of appeal outlined above, and directed that HMRC disclose the information requested, Mr Beadle would face the prospect of having to establish all over again in the substantive appeal hearing that the Tribunal does indeed have jurisdiction to consider that ground of appeal. Similarly, if I refused the interlocutory application for disclosure because I do not consider that the Tribunal has jurisdiction to consider the relevant ground of appeal, it would still be open to Mr Beadle to argue that the Tribunal has jurisdiction in the substantive hearing.

3. The parties were agreed that it would be undesirable for the question of jurisdiction to be relitigated in the substantive appeal. Therefore, with the parties' consent, in this decision, as well as dealing with the application for disclosure, I will determine, as a preliminary issue in the substantive appeal, whether the Tribunal has jurisdiction to determine whether the figure of understated partner tax stated on the PPN is the lawful figure and, if not, what is the lawful figure[1]. I am conscious that it is not generally desirable for issues to be determined as preliminary issues (although I do consider that the preliminary issue that I have formulated meets the criteria referred to by the Upper Tribunal in *Wrottesley v HMRC* [2015] UKUT 0637 (TCC)).

[1] The parties suggested that other issues could be determined as preliminary issues, including the question of whether Mr Beadle's grounds of appeal represented an abuse of process insofar as they invite the Tribunal to look behind the "understated partner tax" taken into account in the PPN. Since I have concluded that the Tribunal does not have jurisdiction in the necessary sense, I do not consider that the "abuse of process" issue arises and I will not, therefore, determine it as a preliminary issue. I did not consider that the other issues the parties specified needed to be determined in connection with the disclosure application, which is why I have not specified them as preliminary issues.

Mr Beadle has other grounds of appeal that will necessitate the finding of facts. Therefore, to avoid any risk of my decision on the preliminary issue being the subject of an appeal to the Upper Tribunal before all facts relevant to Mr Beadle's appeal have been determined, I have extended the deadline for applying for permission to appeal against my decision on the preliminary issue until the substantive appeal has been concluded.

Facts

4. Mr Beadle was a member of Ingenious Film Partners LLP (the "LLP") in the tax year 2004-05. The LLP entered into arrangements (which were "DOTAS arrangements" for the purposes of s219(5) of FA 2014) which it considered resulted in a trading loss for that year. Mr Beadle claimed to carry back his share of that loss to reduce his taxable income for the tax year 2001-02 and obtained a repayment of some £100k of tax that he had previously paid in respect of the 2001-02 tax year.

5. HMRC opened an enquiry into the LLP's tax return for, among others, the tax year 2004-05. On 30 November 2012, HMRC issued the LLP with a closure notice reducing the LLP's trading loss to nil.

6. On 17 October 2014, HMRC issued Mr Beadle with the PPN. That document required Mr Beadle to pay an accelerated partner payment of £100,054.80. That figure was explained as the difference between two calculations the first being "Income Tax and Class 4 National Insurance Contributions (Declared)" of -£100,366.87 and the second being "Income Tax and Class 4 National Insurance Contributions due (Revised)" of £-314.07. The calculation of this figure lies right at the heart of Mr Beadle's case in this appeal and I will outline his arguments in this regard later in the decision. For the time being, I simply note that the accelerated partner payment was, as a general matter, the amount that HMRC considered to be necessary to counteract the effect of the tax repayment referred to at [4].

7. On 5 January 2015, Mr Beadle made representations, under the provisions of paragraph 5 of Schedule 32 of FA 2014 ("Schedule 32") in respect of the PPN. The essence of those representations was that the PPN was not valid because:

(1) The amount of "understated tax" specified in the notice (which determined the amount of accelerated partner payment due under the PPN) could simply not be due as matter of law. The basis for this argument is highly technical and does not need to be addressed in any detail in this decision. However, in essence, Mr Beadle's argument is that HMRC have not followed the correct statutory procedure to counteract the carry back of losses to the 2001-02 tax year which resulted in Mr Beadle obtaining the repayment of tax (even though they have followed the correct procedure to challenge the availability of the trading loss in 2004-05 that was the subject of that carry back claim). This issue was the subject of a decision of the Court of Appeal in *R (on the application of de Silva and another) v HMRC* [2016] EWCA Civ 40. The Supreme Court has recently heard an appeal from the Court of Appeal's decision, but the Supreme Court judgment has not yet been released.

(2) Condition B in paragraph 32 of Schedule 32 of FA 2014 ("Schedule 32") was not met.

8. On 14 May 2015, HMRC informed Mr Beadle that his representations were rejected. In consequence, the accelerated partner payment fell due no later than 12 June 2015. Mr Beadle has not sought judicial review of any HMRC decision relating to the PPN.

9. Mr Beadle did not pay the amount demanded by the due date. On 16 July 2015, HMRC issued him with a penalty under s226 of FA 2014 (as applied by paragraph 7 of Schedule 32) for the sum of £5,002.74 (calculated as 5% of the accelerated partner payment of £100,054.80). Mr Beadle appealed to HMRC against that penalty and requested a review of HMRC's decision when that appeal was rejected. On 4 April 2016, he notified his appeal to the Tribunal.

10. Mr Beadle's grounds of appeal to the Tribunal include arguments that (i) the conditions necessary for HMRC to issue the PPN were not satisfied so that the PPN was void[2]; (ii) that he had a "reasonable excuse" for not paying the accelerated partner payment and (iii) that HMRC erred in concluding that there were no special circumstances so that the penalty could be mitigated. However, the ground of appeal that is most relevant to this application is that, had HMRC applied proper legal principles, they would have concluded that the accelerated partner payment could only be nil and that therefore Mr Beadle should not be penalised for failing to pay the accelerated partner payment claimed.

The application for disclosure

11. On 23 November 2016 Mr Beadle applied to the Tribunal for a direction that HMRC immediately provide confirmation as to:

(1) The amount of Mr Beadle's 2004-05 self-assessment (as calculated under s9(1) of the Taxes Management Act 1970 ("TMA 1970") before any amendment made under s28B of TMA 1970 ("Amount A");

(2) The amount of Mr Beadle's 2004-05 self-assessment after any amendment under s28B(4) Of TMA 1970 ("Amount B"); and

(3) If HMRC assert that Amount B is higher than Amount A, an explanation as to how that conclusion has been reached.

12. In Mr Beadle's application, Amount A is the amount of tax that he determined to be due for the tax year 2004-05 before any adjustment in respect of disputed losses of the LLP. Amount B is the amount of tax that is due in respect of 2004-05 after HMRC make adjustments to Mr Beadle's individual tax return for 2004-05 as a result of disallowing losses in the LLP's partnership tax return for that year. Mr Beadle considers that there should be no difference between Amount A and Amount B because he did not use his share of the loss that the LLP was claiming to reduce taxable income for 2004-05, but rather carried that loss back to reduce his taxable

[2] Although, as noted at [13] below, it was accepted that Conditions A to C set out in paragraph 3 of Schedule 32 were satisfied.

income for the 2001-02 tax year. If, contrary to Mr Beadle's view, HMRC believe that there is a difference between Amount A and Amount B, he wants HMRC to explain why.

13. Mr Beadle wants this information to support the ground of appeal outlined at [10]. In essence, his argument is that the amount of accelerated partner payment that can lawfully be demanded under the PPN is, by virtue of paragraph 4(2) of Schedule 32:

> an amount equal to the amount which a designated HMRC officer determines, to the best of the officer's information and belief as the understated partner tax

Paragraph 4(3) defines the "understated partner tax" as:

> the additional amount that will become due and payable by the relevant partner if … such adjustments were made as are required to counteract so much of what the designated HMRC officer so determines as a denied advantage as is reflected in a return or claim of the relevant partner

Because Mr Beadle argues that HMRC have not followed the correct procedure to challenge his use of losses in the 2001-02 tax year (and so to obtain a tax repayment for that year), the amount of £100,054.80 he says that the amount specified in the PPN cannot represent an amount of tax that would have been "due and payable". Therefore, he argues that no accelerated partner payment was actually due[3] and it follows that there can be no penalty for failing to pay that amount.

14. HMRC's principal objection to providing the information sought is that they do not consider that it can be relevant to the issues arising in the penalty appeal. They argue that Mr Beadle is seeking the information to challenge the validity of the PPN (or the amount claimed under it) but the Tribunal has no jurisdiction to consider these matters. Alternatively, HMRC argue that FA 2014 sets out the procedure for taxpayers to challenge PPNs: they must make representations under paragraph 5 of Schedule 32 and (while the statute does not spell out that judicial review is a remedy), ordinary principles of administrative law mean that a taxpayer dissatisfied with HMRC's decisions relating to PPNs should take judicial review proceedings. While Mr Beadle made some representations under paragraph 5 of Schedule 32, he did not seek judicial review when those representations were rejected. Therefore, HMRC argue that it would be an abuse of process for this Tribunal to entertain arguments relating to the validity of the PPN when such arguments should have been made in judicial review proceedings.

[3] At the hearing Mr Ewart explained that he was not asking the Tribunal to make a general determination to the effect that the PPN was "invalid". Rather his argument is that, the amount of accelerated partner payment could only ever be zero given the points made above and therefore the penalty chargeable was 5% of zero (i.e. zero). He accepted that another way of putting this argument would be to say that HMRC should never have issued the PPN. However, since Mr Beadle is appealing against a penalty charged, Mr Ewart preferred to argue in the Tribunal proceedings that the penalty due was zero.

Relevant statutory provisions

Statutory provisions dealing with PPNs

15. The circumstances in which a PPN may be issued are set out in paragraph 3 of Schedule 32 of Finance Act 2014. Very broadly, that requires three conditions (referred to as Conditions A, B and C in the legislation) to be met. Mr Ewart accepted that these conditions were met.

16. Paragraph 4 of Schedule 32 imposes requirements as to the contents of a PPN. Among other information, paragraph 4 requires a PPN to specify the amount of a payment (referred to in the legislation as an "accelerated partner payment") that the recipient of the PPN must make. I have already set out, at [13] how this amount is determined and its relevance to the issues arising in this application.

17. Paragraph 5 of Schedule 32 entitles a person receiving a PPN to make representations to HMRC objecting to the PPN on the grounds that Conditions A to C referred to in paragraph 3 of Schedule 32 are not satisfied, or objecting to the amount of accelerated partner payment that is required. Any such representations must be made within 90 days of the date the notice was given and HMRC are obliged to consider any representations that are made.

18. There is no statutory right of appeal to this Tribunal against HMRC's decision to issue a PPN. Since the Tribunal is a creature of statute, it follows that the Tribunal has no jurisdiction to set aside a PPN on the grounds that it was not validly issued (applying the principles set out in *HMRC v Hok Ltd* [2012] UKUT 363 and other cases). However, there is an appeal to this Tribunal against a penalty that is imposed in consequence of a relevant partner's failure (or alleged failure) to make an accelerated partner payment.

19. Paragraph 6 of Schedule 32 imposes the obligation to make the accelerated partner payment (the amount of which is determined pursuant to paragraph 4 of Schedule 32 referred to at [16]). The accelerated partner payment must be made before the end of the "payment period" which is defined in paragraph 6(5) of Schedule 32.

20. Paragraph 7 of Schedule 32 imposes a penalty for failure to comply with a PPN as follows:

> **7 Penalty for failure to comply with partner payment notice**
>
> Section 226 (penalty for failure to make accelerated payment on time) applies to accelerated partner payments as if—
>
> (a) references in that section to the accelerated payment were to the accelerated partner payment,
>
> (b) references to P were to the relevant partner, and
>
> (c) "the payment period" had the meaning given by paragraph 6(5).

21. The penalty for failure to comply with a PPN therefore adopts wording of the analogous penalty that relates to accelerated payment notices ("APNs") in s226 of Finance Act 2014. That section provides as follows:

> **226 Penalty for failure to pay accelerated payment**
>
> (1) This section applies where an accelerated payment notice is given by virtue of section 219(2)(a) (notice given while tax enquiry is in progress) (and not withdrawn).
>
> (2) If any amount of the accelerated payment is unpaid at the end of the payment period, P is liable to a penalty of 5% of that amount.
>
> …
>
> (7) Paragraphs 9 to 18 (other than paragraph 11(5)) of Schedule 56 to FA 2009 (provisions which apply to penalties for failures to make payments of tax on time) apply, with any necessary modifications, to a penalty under this section in relation to a failure by P to pay an amount of the accelerated payment as they apply to a penalty under that Schedule in relation to a failure by a person to pay an amount of tax.

Statutory provisions relating to an appeal against the penalty

22. The combined effect of paragraph 7 of Schedule 32 and s226 of Finance Act 2014 is, therefore, that a penalty is imposed for failure to pay the amount of an accelerated partner payment specified in a PPN within the payment period. Paragraphs 9 to 18 (other than paragraph 11(5)) of Schedule 56 of Finance Act 2009 ("Schedule 56") apply to the penalties so imposed.

23. Paragraph 11 of Schedule 56 deals with assessment of penalties as follows:

> **Assessment**
>
> 11—
>
> (1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—
>
> (a) assess the penalty,
>
> (b) notify P, and
>
> (c) state in the notice the period in respect of which the penalty is assessed.
>
> (2) A penalty under any paragraph of this Schedule must be paid before the end of the period of 30 days beginning with the day on which notice of the assessment of the penalty is issued.
>
> (3) An assessment of a penalty under any paragraph of this Schedule—
>
> (a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),
>
> (b) may be enforced as if it were an assessment to tax, and
>
> (c) may be combined with an assessment to tax….

24. Paragraph 13 of Schedule 56 confers a right of appeal to this Tribunal. Therefore, while there is no appeal to the Tribunal against the PPN itself, there is a right of appeal against a penalty that is imposed for failure to make an accelerated partner payment. The scope of the right of appeal is set out as follows:

> **13**
>
> (1) P may appeal against a decision of HMRC that a penalty is payable by P.
>
> (2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

25. Paragraph 14 of Schedule 56 explains the status of any appeal as follows:

> **14**
>
> (1) An appeal under paragraph 13 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about the determination of the appeal by the First tier Tribunal or Upper Tribunal).
>
> (2) Sub-paragraph (1) does not apply –
>
> (a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or
>
> (b) in respect of any other matter expressly provided for by this Act.

26. Paragraph 15 of Schedule 56 sets out the scope of the Tribunal's jurisdiction on an appeal as follows:

> **15**
>
> (1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
>
> (2) On an appeal under paragraph 13(2) that is notified to the tribunal, the tribunal may—
>
> (a) affirm HMRC's decision, or
>
> (b) substitute for HMRC's decision another decision that HMRC had power to make.
>
> …

27. Schedule 56 deals with other matters: it establishes various statutory defences (such as that of "reasonable excuse") and sets out circumstances in which HMRC have power to reduce penalties because of "special circumstances" (together with a limited jurisdiction for the Tribunal to interfere with HMRC decisions in this regard).

Discussion – The Tribunal's jurisdiction

28. At the heart of this application is the question of whether the Tribunal has the jurisdiction to set aside the penalty that HMRC have charged on the basis of Mr Beadle's arguments set out at [12] and [13]. As was made clear in *HMRC v Hok* [2012] UKUT 363, the Tribunal is a creature of statute and the scope of its jurisdiction can only be determined by considering the statutory provisions conferring jurisdiction. I will approach this task firstly by considering relevant aspects of the statutory scheme that results in the Tribunal having jurisdiction to consider Mr Beadle's appeal against the penalty. Having done so, I will consider, in the light of authorities to which I have been referred, what conclusions I should draw on the Tribunal's jurisdiction as conferred by that statutory scheme.

Relevant aspects of the statutory scheme

29. The appeal right set out in paragraph 13 of Schedule 56 is ostensibly quite wide: a taxpayer can appeal against any decision of HMRC that a penalty is payable or as to the amount of that penalty. Similarly, the powers of the Tribunal under paragraph 15 of Schedule 56 are ostensibly wide. When Parliament adopted those appeal rights for the purposes of the PPN regime (in paragraph 7 of Schedule 32 and s226 of FA 2014), it did not qualify that apparently wide appeal right or expressly provide that matters relating to HMRC's calculation of the accelerated partner payment were outside the Tribunal's jurisdiction on a penalty appeal.

30. The PPN regime set out in FA 2014 was part of a closely articulated statutory code whose evident purpose was to deal with what Parliament perceived to be unfair cash flow advantages obtained by users of tax avoidance schemes. In *Rowe and others v HMRC* [2015] EWHC 2293 (Admin), Simler J considered the background to the FA 2014 provisions including (at [20] of the judgment) extracts from the Government's response to a consultation preceding the introduction of legislation that summarised the Government's view as follows:

> The Government's proposals therefore have the simple objective of changing the presumption of where the tax sits, so that anyone who enters into an avoidance scheme will have to pay over the tax in dispute.

Simler J's analysis of the background to the statutory provisions led her to the conclusion (set out at [70] of *Rowe*) that:

> Parliament has enacted a statutory scheme intended to operate broadly across a wide range of tax avoidance schemes to remove the cash flow advantage pending enquiry and appeal.

31. The legislative purpose outlined at [30] is achieved, in part, by ensuring, in paragraph 4(2) of Schedule 32 that the accelerated partner payment due is based on an HMRC officer's determination (to the best of his or her information and belief) as to the amount needed to counteract the tax advantage that the taxpayer is claiming. It does not, therefore, provide that the accelerated partner payment is the amount that will <u>actually</u> be due if the taxpayer's planning fails to achieve its objective. This is quite deliberate: a PPN can only be issued in the context of a "DOTAS arrangement"

which will, by definition, involve a strong difference of opinion between the taxpayer and HMRC as to how much tax is actually due. The evident purpose of paragraph 4(2) is to ensure that HMRC's estimate of the additional tax that will be due if the scheme fails is to drive the amount of accelerated partner payment although HMRC will, of course, be subject to their ordinary duties under public law when making this estimate.

32. Paragraph 6 of Schedule 32 treats an accelerated partner payment, when made, as a payment on account of tax. One effect of this is that, if once any dispute as to the underlying liability has been determined, HMRC's estimate turns out to be excessive (or if the planning succeeds so that the taxpayer has no liability to HMRC at all), the accelerated partner payment becomes repayable to the extent of the excess.

33. In paragraph 5 of Schedule 32, Parliament has prescribed the procedure that a taxpayer dissatisfied with HMRC's determination of the accelerated partner payment must follow. In essence, the taxpayer is given the right only to make representations to HMRC (and those representations can be made only on certain specified grounds). HMRC are required by paragraph 5(2) of Schedule 32 to consider those representations. There is, however, no right to appeal to the Tribunal against HMRC's decision to issue a PPN or against HMRC's determination of the accelerated partner payment specified in the PPN. Although the statutory provisions do not make this express, it is clear that taxpayers are also entitled to seek the remedy of judicial review.

34. The penalty imposed by paragraph 7 of Schedule 32 (when read together with s226 of FA 2014) arises if the accelerated partner payment is unpaid by the end of the payment period. As I have noted at [31], the "accelerated partner payment" is an amount determined by an HMRC officer to the best of his or her information and belief. Therefore, the statutory provisions penalise a failure to pay such amount as is determined by an HMRC officer. However, a taxpayer is given a specific right to make representations as to HMRC's determination of the accelerated partner payment by paragraph 5(1)(b) of Schedule 32 and, the effect of paragraph 6(5) of Schedule 32 is that making representations has the effect of extending the date by which payment must be made. Therefore, a taxpayer who makes representations is only penalised for failing to pay the amount of accelerated partner payment that HMRC determine (having considered the representations) to be due.

35. Section 226(2) of FA 2014 provides that, where an accelerated partner payment is unpaid at the end of the payment period, the taxpayer concerned "is liable to a penalty of 5% of that amount". Paragraph 11 of Schedule 56 provides that where a taxpayer "is liable" for a penalty, then HMRC must assess the penalty. Section 226(2) does not, therefore, give HMRC any express discretion not to penalise a taxpayer who fails to pay an accelerated partner payment, although paragraph 9 of Schedule 56 gives HMRC discretion to reduce a penalty owing to the presence of statutorily defined "special circumstances".

Relevant authorities

36. Both Mr Ewart and Ms Nathan took me to common law authorities relating to, among other matters, what has come to be referred to the "exclusivity principle" set out in *O'Reilly v Mackman* [1983] UKHL 1 and exceptions to that principle. The "exclusivity principle" and its exceptions are effectively rules of procedure which deal with the question of when it would be an abuse of process for a person to raise, in an ordinary action, questions of the legality of a public body's acts which could have been raised in judicial review proceedings (and as such subject to High Court rules designed to weed out unmeritorious or late claims). Those authorities do not, therefore, deal with the question of statutory construction that is at the heart of this application. However, the authorities may cast some light on what Parliament intended when it enacted the statutory scheme and conferred a right of appeal to this Tribunal in relation to penalties charged under it.

37. Mr Ewart relied strongly on *Mayor and Burgesses of London Borough of Wandsworth v Winder* [1984] UKHL 2. In that case, a local authority sued a tenant for arrears of rent. The tenant's defence was that the resolutions and notices of rent increase were not within the local authority's power to make and thus were void so that, as a matter of law, there were no arrears. The local authority argued that making this argument amounted to an abuse of process since the tenant had already tried, and failed, to obtain judicial review of the decision to increase the rent. However, that argument was rejected. Lord Fraser, in a speech with which all members of the panel agreed, said that this represented an exception to the exclusivity principle:

> It would in my opinion be a very strange use of language to describe the respondent's behaviour in relation to this litigation as an abuse or misuse by him of the process of the court. He did not select the procedure to be adopted. He is merely seeking to defend proceedings brought against him by the appellants. In so doing he is seeking only to exercise the ordinary right of any individual to defend an action against him on the ground that he is not liable for the whole sum claimed by the plaintiff. Moreover, he puts forward his defence as a matter of right, whereas in an application for judicial review, success would require an exercise of the court's discretion in his favour. Apart from the provisions of Ord. 53 and section 31 of the Supreme Court Act 1981, he would certainly be entitled to defend the action on the ground that the plaintiff's claim arises from a resolution which (on his view) is invalid - see for example *Cannock Chase District Council v. Kelly* [1978] 1 W.L.R. 1, which was decided in July 1977, a few months before Ord. 53 came into force (as it did in December 1977). I find it impossible to accept that the right to challenge the decision of a local authority in course of defending an action for payment can have been swept away by Ord. 53, which was directed to introducing a procedural reform

38. Therefore, *Wandsworth v Winder* draws a distinction between the positions of claimants and defendants. On its own, *Wandsworth v Winder* does not offer guidance on how the statutory scheme in FA 2014 and Schedule 56 should be construed. However, subsequent authorities have applied the principle enunciated in *Wandsworth v Winder* to questions of statutory construction. For example, in *Boddington v British Transport Police* [1998] UKHL 13, the question arose whether, in criminal

proceedings, a defendant who had been charged with smoking in a railway carriage, was able to argue that bylaws made by the Railways Board under s67 of the Transport Act 1962 that purported to ban smoking in carriages, were not validly made. Lord Irvine emphasised the central role of statutory construction stating:

> However, in every case it will be necessary to examine the particular statutory context to determine whether a court hearing a criminal or civil case has jurisdiction to rule on a defence based upon arguments of invalidity of subordinate legislation or an administrative act under it. There are situations in which Parliament may legislate to preclude such challenges being made, in the interest, for example, of promoting certainty about the legitimacy of administrative acts on which the public may have to rely.

He went on to explain how such questions of statutory construction should be approached:

> However, in approaching the issue of statutory construction the courts proceed from a strong appreciation that ours is a country subject to the rule of law. This means that it is well recognised to be important for the maintenance of the rule of law and the preservation of liberty that individuals affected by legal measures promulgated by executive public bodies should have a fair opportunity to challenge these measures and to vindicate their rights in court proceedings. There is a strong presumption that Parliament will not legislate to prevent individuals from doing so…
>
> The particular statutory schemes in question in *Reg. v. Wicks* [1998] AC 92 and in the *Quietlynn* case [1988] 1 Q.B. 114 did justify a construction which limited the rights of the defendant to call the legality of an administrative act into question. But in my judgment it was an important feature of both cases that they were concerned with administrative acts specifically directed at the defendants, where there had been clear and ample opportunity provided by the scheme of the relevant legislation for those defendants to challenge the legality of those acts, before being charged with an offence.
>
> By contrast, where subordinate legislation (e.g. statutory instruments or byelaws) is promulgated which is of a general character in the sense that it is directed to the world at large, the first time an individual may be affected by that legislation is when he is charged with an offence under it: so also where a general provision is brought into effect by an administrative act, as in this case. A smoker might have made his first journey on the line on the same train as Mr. Boddington; have found that there was no carriage free of no smoking sign and have chosen to exercise what he believed to be his right to smoke on the train. Such an individual would have had no sensible opportunity to challenge the validity of the posting of the no smoking signs throughout the train until he was charged, as Mr. Boddington was, under Byelaw 20. In my judgment in such a case the strong presumption must be that Parliament did not intend to deprive the smoker of an opportunity to defend himself in the criminal proceedings by asserting the alleged unlawfulness of the decision to post no smoking notices throughout the train. I can see nothing in section 67 of the Transport Act 1962 or the

> byelaws which could displace that presumption. It is clear from *Wandsworth London Borough Council v. Winder* [1985] AC 461 and Reg. v. Wicks [1998] AC 92, 116, per Lord Hoffmann that the development of a statutorily based procedure for judicial review proceedings does not of itself displace the presumption.

39. Mr Ewart argued with some justification that there were a number of similarities between *Pawlowski (Collector of Taxes) v Dunnington* [1999] STC 530 and the present application. In *Pawlowski,* HMRC[4] made a direction to the effect that PAYE should be collected from a director receiving a payment, rather than a company making the payment. The statutory scheme enabled HMRC to make this direction if they considered that the director knew that the employing company had wilfully failed to deduct PAYE from the payment. There was no right of appeal against such an HMRC direction (although HMRC's decision to make a direction could be subject to judicial review). In proceedings in the County Court in which HMRC sought to recover PAYE from the director, the director sought to argue that HMRC should not have made the direction since he did not know that the employer had wilfully failed to account for PAYE. HMRC argued that raising this argument in enforcement proceedings amounted to an abuse of process. However, the Court of Appeal disagreed and, applying *Wandsworth v Winder* held that the taxpayer could raise the argument as a defence in enforcement proceedings even though this would cause HMRC practical difficulties as regards the collection of tax. In his concluding remarks, Simon Brown LJ drew a distinction between the circumstances of the *Pawlowski* appeal and that of *IRC v Aken* [1990] STC 497 (where there was a statutory right of appeal against assessments with the result that the court held that the taxpayer could not dispute his liability to tax in enforcement proceedings). He suggested that HMRC's solution to the practical problems they had identified (of having to deal with an appellant who was disputing liability to tax at what HMRC regarded as the collection stage) was for HMRC to give taxpayers a right of appeal against the kind of PAYE direction that had been made.

40. In tax appeals, there is room for doubt as to whether a taxpayer who is seeking to contest an HMRC assessment to income tax should be regarded as a claimant or defendant for the purposes of applying the distinction in *Wandsworth v Winder*. On one view, as a matter of substance, the appellant would be seeking to defend itself from an assessment to tax that HMRC had made and so should be regarded as a defendant. However, as a matter of legal form, to dispute an assessment to income tax, an appellant needs to appeal to HMRC against that assessment. If HMRC do not allow that appeal, it is notified to the Tribunal so that the Tribunal are determining an appeal that the taxpayer has brought. In that sense, it could be said that the taxpayer is a claimant, not a defendant.

41. A similar issue was considered in *King v Walden* [2001] TC 822. The issue in that case was not concerned with the distinction between claimants and defendants set out in *Wandsworth v Winder* but rather whether, in circumstances where HMRC had assessed a taxpayer to penalties, the taxpayer had "instigated" proceedings disputing liability to those penalties for the purposes of the Human Rights Act 1998. Having

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[4] At that time, the relevant body was strictly the Inland Revenue. However, I will use the expression "HMRC" for consistency.

considered the machinery for raising assessments under the Taxes Management Act 1970, Jacob J decided that, an appeal against assessments was essentially a defensive step, rather than offensive. At [58] of his judgment, he concluded:

> In these circumstances, I think it is artificial to say that proceedings are instigated by the taxpayer. It is the assessments which instigate the proceedings which come before the [Special Commissioners], not the appeal itself.

Conclusions as to the Tribunal's jurisdiction

42. Reading the statutory provisions in context, and with due regard to the purpose for which they are enacted, I do not consider that the Tribunal has jurisdiction to consider an argument that no penalty should be payable because the accelerated partner payment either is, or should be, less than the amount specified in the PPN.

43. Parliament has chosen to penalise taxpayers who do not pay an accelerated partner payment when due. The accelerated partner payment is an amount that HMRC alone are entitled to determine subject, of course, to the taxpayer's right to make representations against that determination and to HMRC's duties under public law. Parliament has not given taxpayers who are dissatisfied with HMRC's calculation of an accelerated partner payment the right to appeal to the Tribunal. This cannot be an oversight given the central role that the Tribunal plays in adjudicating generally on tax disputes between HMRC and taxpayers. All of those are strong indications that Parliament did not intend the Tribunal to be able to decide, in a penalty appeal, that the accelerated partner payment was, or should be, some figure other than that set out in the PPN.

44. The appeal right set out in paragraph 13 of Schedule 56 is, as I have noted, drafted quite broadly. However, that needs to be understood in the context of the statutory scheme imposing the penalty at issue. HMRC does not have a general discretion as to whether to charge a penalty: Section 226 of FA 2014 provides that a taxpayer who is late paying an accelerated partner payment "is liable" to a penalty (subject to the specific statutory defences in Schedule 56) and Schedule 56 gives HMRC only a limited power to reduce penalties because of "special circumstances". Therefore, in order to determine the "matter in issue" for the purposes of s49D of TMA 1970 in Mr Beadle's appeal, the Tribunal need only decide (i) whether he paid the accelerated partner payment specified in the PPN on time (ii) if not, whether HMRC have correctly calculated the penalty as 5% of the accelerated partner payment specified in the PPN (iii) whether a statutory defence is available and (iv) whether the Tribunal is able to exercise its limited jurisdiction to alter HMRC's decision on "special circumstances". The apparently broadly drafted right of appeal does not require the Tribunal to consider whether HMRC should have calculated the accelerated partner payment differently.

45. Mr Ewart argued that, if the Tribunal had no power to consider HMRC's calculation of the accelerated partner payment, the result would be that HMRC could demand payment of sums that were not due in law, yet the whole purpose of the PPN legislation is simply to deal with the time at which sums due in law are to be paid. It may be that situations such as this can arise. For example, if the taxpayers in *de Silva*

are successful in their appeal to the Supreme Court, it may be that Mr Beadle cannot be liable for the amount of tax specified in his PPN (although I will make no determination of that point). However, that is the statutory regime that Parliament has enacted reasoning, presumably, that it is not fundamentally more unjust for taxpayers to have to pay "up front" amounts in respect of tax that turn out not to be due (and so are refunded) than it is for users of avoidance schemes that ultimately fail to have the use of the tax at issue while the dispute is ongoing. I do not consider that, having enacted a scheme that denies taxpayers a general right of appeal to the Tribunal against HMRC's calculation of the accelerated partner payment, Parliament intended taxpayers to be able to raise the issue in an appeal against a penalty.

46. Mr Ewart also suggested that the conclusion at [43] could result in Mr Beadle facing a penalty even though he did not owe any additional tax. He therefore suggested that the conclusion was at odds with the scheme of the legislation whose purpose was simply to deal with the time at which tax liabilities, or estimates thereof, must be paid and not to create completely new liabilities (and penalties) determined solely by reference to HMRC determinations. I do not accept that submission. While, as I have noted, accelerated partner payments are themselves treated as payments on account of tax, the penalties are a different matter and are imposed simply for failure to pay an accelerated partner payment on time.

47. Mr Ewart also argued that the authorities referred to in the previous section compel a different conclusion. I agree that those authorities might cast some light on what Parliament intended when enacting the relevant statutory regime given the comments on statutory construction in *Boddington* and *Pawlowski*. However, I do not consider that they can alter the plain effect of the statutory provisions that Parliament has enacted.

48. In *Boddington*, it was made clear that in certain circumstances, given the importance of the rule of law, there will be a strong presumption when construing statutory schemes that they entitle citizens to challenge decisions of a public authority in court proceedings brought by that public authority. However, the conditions necessary for that "strong presumption" to arise are not present in this appeal. Mr Beadle has had a "sensible opportunity" to challenge HMRC's determination of the accelerated partner payment (in the words of Lord Irvine in *Boddington*). The statutory provisions themselves gave Mr Beadle the opportunity to make representations. Moreover, they impose a duty on HMRC to consider the representations and provide that Mr Beadle cannot be penalised until HMRC have done so. The High Court has in judicial review proceedings in *Dr Walapu v HMRC* [2016] EWHC 658 (Admin) and in *Rowe* concluded that the right to make representations and to challenge HMRC's decision by way of judicial review was sufficient to accord with principles of natural justice and, therefore, I do not believe that considerations relating to the rule of law, important though they are, justify reading the statutory provisions in a manner inconsistent with their natural meaning.

49. The decision of the Court of Appeal in *Pawlowski* has given me some pause for thought as the situation considered in that case had some similarities with the circumstances of this application. Mr Ewart understandably drew my attention to the distinction that the Court of Appeal drew between cases where there was a statutory

right of appeal against a public authority's decision and the situation, in *IRC v Aken*, where there was not. However, in *Pawlowski*, the Court of Appeal did not determine that in every case where a statutory scheme does not provide a right of appeal to an independent tribunal against the decision of a public body, it necessarily follows that a citizen can challenge the lawfulness of that decision in proceedings in which he or she is a defendant. Indeed, *Boddington* makes it clear that this question can be determined only in the light of the particular statutory scheme being considered and I have already explained why the statutory scheme does not give the Tribunal jurisdiction, in a penalty appeal, to consider whether HMRC should have calculated the accelerated partner payment differently.

50. My conclusions as to the effect of the statutory provisions are fortified by considering the purpose for which they were enacted. Parliament has decided that, in tax avoidance situations where particular conditions are met, HMRC should have the right to demand accelerated payment of their determination of the tax in dispute before a court or tribunal has determined the amount of tax, if any, that the taxpayer owes. If Mr Ewart were correct in his submissions the result would be that a taxpayer could simply refuse to pay the accelerated partner payment demanded, wait until HMRC commenced enforcement proceedings and only then argue that HMRC applied a flawed approach to calculating the sum claimed. Moreover, the same arguments could be deployed in penalty proceedings. While courts and tribunals consider these arguments, the taxpayer would retain the use of the tax in dispute. Furthermore, a logical corollary of Mr Beadle's approach would be that taxpayers could always argue in enforcement and penalty proceedings that the underlying tax avoidance scheme succeeded in its objective so that no additional tax could ever be due as a matter of law. In those cases, penalty appeals or enforcement proceedings might turn into "mini trials" on the merits of the avoidance scheme, or at very least might be stayed until a court or tribunal had adjudicated on the efficacy of that scheme. I do not consider that Parliament could have intended any of these results in the context of legislation whose very purpose was to remove cash flow advantages from taxpayers who enter into tax avoidance arrangements.

51. My overall conclusion, therefore, is that the Tribunal does not have jurisdiction in the penalty appeal to consider whether HMRC should have made a different determination of the accelerated partner payment. Since Mr Beadle wants the information sought in order to help him to make such an argument, I refuse his application.

52. I have reached the conclusion set out above by construing the statutory scheme that gives the Tribunal jurisdiction. Since I have concluded that the Tribunal does not have jurisdiction, I do not need to consider the separate but related question of whether it would be an abuse of process for Mr Beadle to make his arguments. I will, however, say that if it were necessary to determine whether Mr Beadle is a claimant or a defendant in the penalty proceedings for the purposes of applying the decision in *Wandsworth* v *Winder*, I would have concluded that he is a defendant. Ms Nathan sought to distinguish *King* v *Walden* on the grounds that it pre-dated the self-assessment regime for income tax and was concerned with the Human Rights Act 1998 and not the statutory regime relating to PPNs. However, in my judgement, the

reasoning of Jacob J set out at [41] is equally applicable as Mr Beadle is clearly seeking to defend himself from a penalty that HMRC are seeking to charge.

53. Finally, even if I concluded that the Tribunal had jurisdiction to consider Mr Beadle's relevant ground of appeal, I would have refused the disclosure application. Mr Beadle does not need the information requested to make his argument that the accelerated partner payment has been determined incorrectly. He knows the amount of taxable income that he returned for 2004-5 and he knows how he has used what he considers to be his share of the LLP's losses. His application for disclosure is effectively an application for advance notice of HMRC's submissions on the issue and I would refuse it for that reason.

Conclusion and right to apply for permission to appeal

54. Mr Beadle's application for disclosure is dismissed.

55. As a preliminary issue, I conclude that the Tribunal has no jurisdiction, in Mr Beadle's substantive appeal, to determine whether the figure of understated partner tax stated on the PPN is the lawful figure and, if not, what is the lawful figure.

56. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal:

(1) not later than 56 days after this decision is sent to that party insofar as permission to appeal is sought against my decision at [54]; and

(2) not later than 56 days after the date of the Tribunal decision that disposes of all issues in proceedings insofar as permission to appeal is sought against my decision at [55].

The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 5 JULY 2017